COMMONWEALTH OF KENTUCKY BEFORE THE PUBLIC SERVICE COMMISSION

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IN THE MATTER OF:)	PUBLIC SERVICE COMMISSION
PETITION OF NPCR, INC. d/b/a)	CASE NO. 2003-00143
NEXTEL PARTNERS FOR	í	
DESIGNATION AS AN ELIGIBLE	Ś	
TELECOMMUNICATIONS CARRIER	í	
IN THE COMMONWEALTH OF KENTUCKY	í	

COMMENTS OF NPCR, INC. d/b/a NEXTEL PARTNERS

I. <u>INTRODUCTION</u>

The fundamental question presented by this proceeding is whether the Kentucky Public ("Commission") will Service Commission effectuate the requirements the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq. (the "Act") and establish competitive local telecommunications markets in which new entrants, including a commercial mobile radio services ("CMRS") provider, can be eligible to receive universal service funds to meet the telecommunications needs of Kentucky consumers. Consistent with law, the Commission should designate NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners" or the "Company") as an eligible telecommunications carrier ("ETC") in the state of Kentucky, and reject attempts to protect the interests of monopoly local exchange carriers ("LECs") to the ultimate detriment of Kentucky consumers. Designating Nextel Partners as an ETC is consistent with the statutory mandates of Section 214(e) of the Act, the directives of the Federal Communications Commission ("FCC"), and in areas served by rural telephone companies, the interests of the public.

Nextel Partners hereby submits these comments in support of its Petition for designation as an ETC in accordance with 47 U.S.C. § 214(e). Nextel Partners' Petition establishes that the Company satisfies Section 214(e)(1)'s requirements for designation in non-rural areas.

Intervenors¹ do not dispute that Nextel Partners satisfies these basic criteria.² Moreover, the record also establishes that the designation of Nextel Partners as an additional ETC in areas served by the rural telephone companies is in the public interest as required by 47 U.S.C. § 214(e)(2). Accordingly, the Commission should designate Nextel Partners as an ETC in the rural telephone company study areas and the non-rural telephone company wire centers identified in Nextel Partners' Petition.³

II. STATEMENT OF THE CASE

This matter was commenced on April 23, 2003, when Nextel Partners filed a Petition to be designated as an ETC in the state of Kentucky. Its verified Petition⁴ describes and demonstrates how Nextel Partners meets the ETC criteria and documents its requested ETC service areas based on its FCC-licensed areas and current coverage maps. Nextel Partners'

Nextel Partners offers, or will offer, all of the services designated by the FCC for support pursuant to Section 254(c)(3) of the Act; that Nextel Partners offers, or will offer, the supported services using its own facilities; and that Nextel Partners advertises, or will advertise, the availability of the supported services and the charges therefore using media of general distribution. . . .

Id. ¶ 6.

¹ See infra nn. 5-6.

² The Commission previously applied the Section 214(e)(1) factors in designating e-Tel as an ETC in the non-rural exchanges of BellSouth. See In the Matter of: e-Tel, LLC, For Designation As An Eligible Telecommunications Carrier, Case No. 2002-00323 (Ky. P.S.C. Nov. 26, 2002) ("e-Tel Order").

³ Attachment 1 to Nextel Partners' Petition sets forth the rural telephone company study areas and non-rural telephone company wire centers in which it seeks designation. By filing made on February 13, 2004, Nextel Partners withdrew Leslie County Telephone Company from its Petition.

⁴ Attachment 3 to Nextel Partners' Petition is the Declaration of Donald J. Manning, Vice President and General Counsel for Nextel Partners, Inc. Therein, Manning verifies the facts set forth in the Petition, *id.* ¶ 7, and declares that:

Petition sought designation for receipt of federal universal service funds now available to the incumbent ETCs.

TDS Telecom Companies⁵ and Logan Telephone Cooperative, Inc., et al.⁶ (hereafter "Intervenors") intervened and offered responsive comments on Nextel Partners' Petition. However, the Intervenors have no legitimate dispute as to Nextel Partners' satisfaction of the ETC requirements. Rather, the Intervenors have submitted policy statements and legal arguments relating to the FCC's ongoing consideration of federal universal service funding issues.

III. BACKGROUND OF FEDERAL UNIVERSAL SERVICE MECHANISMS

In the Act, Congress directed the FCC and states to act jointly to establish support mechanisms to ensure the delivery of basic telecommunications services to all Americans. 47 U.S.C. § 254(a)(1). Although telephone service is widely available in most areas of the country, there remain unserved and underserved areas, and there are difficulties associated with maintaining high subscribership levels both in rural, high cost areas and for low-income consumers. Prior to the Act, the states and the federal government attempted to increase access to basic telecommunications services in rural areas through a series of implicit subsidies designed to benefit incumbent LECs, such as excessive access charges, provisioning of non-competitive services at above-cost rates and state geographically averaged rates.

⁵ TDS Telecom, which includes Leslie County Telephone Company and Lewisport Telephone, submitted comments on July 17, 2003. As noted above, Nextel Partners has withdrawn its request in Leslie County's study area.

⁶ Logan Telephone Cooperative, Inc., together with Mountain Rural Telephone Cooperative Corporation, Inc., People's Rural Telephone Cooperative Corporation, Inc., South Central Rural Telephone Cooperative Corporation, Inc., and the Independent Telephone Group, were permitted to intervene on July 9, 2003. They submitted comments on July 23, 2003, and supplemental comments on September 26, 2003.

By mandating the establishment of explicit federal and state universal service support mechanisms under the Act, Congress sought to move away from reliance on implicit subsidies, which are not sustainable in the competitive telecommunications environment envisioned by the Act.⁷ Rather, Congress envisioned that competition would drive costs and prices down in all telephone markets, with explicit federal and state subsidies then available to the ETC serving the consumer.⁸

Through the Act, Congress directed the FCC and states to establish specific, predictable and sufficient support mechanisms for universal service, and mandated that all telecommunications carriers providing interstate service contribute to support federal universal service mechanisms. See 47 U.S.C. § 254(d). The FCC has put in place funding mechanisms that provide for sufficient and predictable funding in high cost areas. In conjunction with the Joint Board, the FCC continues to seek comment on how these funding mechanisms can be improved to better achieve the goals of the Act. As part of this process, the FCC adopted a five year plan in 2001 that assures rural telephone companies will not lose federal universal service support – even if they lose customers – through 2006. This was seen as a transition period during which competitive universal service would be allowed to develop in rural company areas:

We conclude that the plan we adopt today will preserve and advance universal service, consistent with the goals and principles set forth in section 254 of the Act, and encourage competition in high-cost areas, consistent with the competitive goals of the 1996 Act. In particular, we find that adoption of the modified embedded cost mechanism is consistent with our obligation to ensure that the support provided to rural carriers over the next five years is specific, predictable, and sufficient. In addition, we find that the mechanism is consistent with the

⁷ In the Matter of Federal-State Joint Commission on Universal Service, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 17 (rel. May 8, 1997) ("Universal Service Order").

⁸ Universal Service Order, $\P\P$ 17-19; In the Matter of Federal-State Joint Commission on Universal Service, CC Docket No. 96-45, Seventh Report and Order, FCC 99-119, \P 30 (rel May 28, 1999) ("Seventh Report and Order").

goals of section 254 to ensure that consumers in rural, insular, and high-cost areas have access to telecommunications services at rates that are affordable and reasonably comparable to rates charged for similar services in urban areas. We find further that the flexible plan for disaggregating and targeting support adopted in this Order will facilitate competitive entry into high-cost areas, bringing the benefits of competition to consumers in rural areas.⁹

Now that these mechanisms are in place, it is up to this Commission to ensure that they will be utilized to provide benefits to consumers in high cost, rural areas of Kentucky.

Granting ETC designation does not in and of itself mean Nextel Partners will receive federal subsidies, but instead only makes Nextel Partners eligible to receive funding to support subscribers of universal service offerings that comply with the FCC's rules and regulations. Once designated, "a carrier's continuing status as an [ETC] is contingent upon continued compliance with the requirements of Section 214(e) and only an eligible carrier that succeeds in attracting and/or maintaining a customer base to whom it provides universal service will receive universal service support." In addition, Nextel Partners' ability to receive support from the federal funds will not completely level the playing field with the incumbent LECs because the LECs will continue to receive implicit subsidies not available to Nextel Partners. It will, however, prompt competition in the universal service market and is the first step in allowing Kentucky consumers the benefits envisioned by the Act.

Both the Act and the FCC's *Universal Service Order* establish with great clarity the requirements for a carrier to be designated an ETC. Section 214(e)(1) requires a carrier: to be a common carrier; provide a base set of supported services established by the FCC in 47 C.F.R. § 54.101(a)(1)-(9); advertise the availability of the services and charges; provide the supported

⁹ In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Fourteenth Report and Order, FCC 01-157, ¶ 10 (rel. May 23, 2001).

¹⁰ Universal Service Order, ¶ 138.

services throughout a designated service area; and in areas served by rural telephone companies, demonstrate that designation of an additional ETC is in the public interest. 47 U.S.C. § 214(e)(1)-(2).

IV. NEXTEL PARTNERS SATISFIES THE ELIGIBILITY CRITERIA OF 47 U.S.C. § 214(e)(1)

The undisputed record evidence establishes that Nextel Partners meets all criteria for ETC designation contained in Section 214(e)(1). Those criteria are discussed below with reference to the record evidence. This Commission should find, as the commissions in Mississippi, Iowa and Wisconsin have found, that Nextel Partners meets these criteria.¹¹

A. Nextel Partners is a Common Carrier

The first requirement for ETC designation is status as a common carrier under federal law. Nextel Partners is a "telecommunications carrier" as defined in 47 U.S.C. § 153(49), and is authorized by the FCC to provide CMRS essentially statewide. A "common carrier" is generally defined in 47 U.S.C. § 153(10) as a person engaged as a common carrier on a for-hire basis in interstate communications utilizing either wire or radio technology. The FCC's regulations specifically provide that a specialized mobile radio service, such as that provided by Nextel Partners, is a common carrier service. See 47 C.F.R. § 20.9(a)(4). Nextel Partners is therefore a "common carrier" for purposes of obtaining ETC designation under 47 U.S.C. § 214(e)(1). No evidence has been presented that Nextel Partners is not a common carrier. Accordingly, the Commission should conclude Nextel Partners meets this requirement.

¹¹ The orders granting Nextel Partners as an ETC in those states are attached hereto.

Nextel Partners is the A, B and C Block EA licensee in Kentucky (Nextel Partners' Petition, p. 1, n.1), which includes all but the north central tip of the state.

B. Nextel Partners Provides Each of the FCC's Supported Services

The clear and unchallenged record evidence confirms that Nextel Partners currently provides each of the supported services required of an ETC under 47 C.F.R. § 54.101(a), and will offer all of those services to its universal service customers once designated an ETC. (Nextel Partners' Petition, § I.B.) No contrary evidence was offered by the Intervenors, and thus they have implicitly conceded that Nextel Partners currently provides these services and that it can and will provide the services to its universal service customers once designated. (*Id.*) Each of these federal universal services is discussed more fully below.

- 1. <u>Voice-grade access to the public switched telephone network</u>. The FCC concluded that voice-grade access means the ability to make and receive phone calls, within the 300 to 3000 Hertz frequency range. 47 C.F.R. § 52.101(a)(1) Neither the Commission nor the FCC requires high-speed data transmissions. *Universal Service Order*, ¶¶ 63-64. Through its interconnection arrangements with local telephone companies, all Kentucky customers of Nextel Partners are able to make and receive calls on the public switched network within the FCC's specified bandwidth. (Nextel Partners' Petition, § I.B.1.) No evidence has been presented disputing that Nextel Partners currently provides this service and will provide this service to its universal service customers.
- 2. <u>Local usage</u>. Beyond providing access to the public switched network, an ETC must include an amount of free local usage determined by the FCC as part of a universal service offering. 47 C.F.R. § 54.101(a)(2). The FCC has not quantified a minimum amount of local usage required to be included in a universal service offering, but has declined to require that ETCs offer unlimited local usage.¹³ Nextel Partners will include local usage in its universal service offerings. (Nextel Partners' Petition, § I.B.2.)
- 3. <u>Dual-tone</u>, <u>multi-frequency ("DTMF") signaling</u>, or its functional <u>equivalent</u>. DTMF is a method of signaling that facilitates the transportation of call set-up and call detail information. Consistent with the principles of competitive and technological neutrality, carriers that provide signaling that is functionally equivalent to DTMF meet this service requirement. 47 C.F.R. § 54.101(a)(3). Nextel Partners uses out-of-band digital signaling and in-band multi-frequency ("MF") signaling that is functionally equivalent to DTMF signaling in satisfaction of this requirement. (Nextel Partners' Petition, § I.B.3.)

In The Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Order and Order on Reconsideration, ¶ 14 (rel. July 14, 2003) ("July 2003 Order").

- 4. <u>Single-party service or its functional equivalent</u>. "Single-party service" means that only one party will be served by a subscriber loop or access line, in contrast to a multi-party line. 47 C.F.R. § 54.101(a)(4). *Universal Service Order*, ¶ 62. Nextel Partners meets this requirement by providing a dedicated message path for the length of all customer calls. (Nextel Partners' Petition, § I.B.4.)
- 5. Access to emergency services. The ability to reach a public safety answering point ("PSAP") by dialing 911 is a required service in any universal service offering. Enhanced 911 or E911, which includes the capability of providing both automatic numbering information ("ANI") and automatic location information ("ALI"), is only required if a PSAP is capable of receiving and utilizing such information, and requests the delivery of such information from a wireless provider. *Universal Service Order*, ¶ 72-73. The record reflects that Nextel Partners currently provides all of its customers with access to emergency services by dialing 911 in satisfaction of this requirement. (Nextel Partners' Petition, § I.B.5.) In addition, Nextel Partners has launched eight counties at Phase I E911 service, and one county, with four pending requests, for Phase II E911 requests in accordance with FCC rules. (*Id.*)
- 6. Access to operator services. Access to operator services is defined as any automatic or live assistance provided to a consumer to arrange for the billing or completion, or both, of a telephone call. 47 C.F.R. § 54.101(a)(6). Universal Service Order, ¶ 75. Nextel Partners demonstrated it meets this requirement by providing all of its customers with access to operator services provided by either the Company or other entities (e.g., LECs, IXCs, etc.). (Nextel Partners' Petition, § I.B.6.)
- 7. Access to interexchange service. A universal service provider must offer consumers access to interexchange service to make and receive interexchange calls. 47 C.F.R. § 54.101(a)(7). Nextel Partners presently meets this requirement by providing all of its customers with the ability to make and receive interexchange or toll calls through direct interconnection arrangements the Company has with several interexchange carriers (IXCs). (Nextel Partners' Petition, § I.B.7.) Additionally, customers of Nextel Partners are able to reach their IXC of choice by dialing the appropriate access code. (*Id.*)
- 8. Access to directory assistance. The ability to place a call directly to directory assistance is a required service offering. 47 C.F.R. § 54.101(a)(8). Nextel Partners meets this requirement by providing all of its customers with access to directory assistance by dialing "411." (Nextel Partners' Petition, § I.B.8.)
- 9. <u>Toll limitation for qualifying low income consumers</u>. An ETC must offer either "toll control" or "toll blocking" services to qualifying Lifeline customers at no charge. Nextel Partners is unable, at this time, to provide "toll

control." But the undisputed record evidence establishes that the Company is fully capable of providing toll limitation service, i.e., "toll blocking," and that it can and will utilize the same toll limitation technology to provide the service to its Lifeline and Link Up customers, at no charge, as part of its universal service offerings. (Nextel Partners' Petition, § I.B.9.)

Accordingly, the record evidence is clear and undisputed that Nextel Partners currently offers each of the required services, and can and will offer those services to its universal service customers once it is designated as an ETC. The record supports only one possible conclusion – Nextel Partners meets this requirement for ETC designation.

C. Nextel Partners Will Satisfy Advertising Requirements

The third requirement for ETC designation is that a carrier agree to advertise the availability of the supported services and charges using media of general distribution. 47 U.S.C. § 214(e)(1). To date, neither the FCC nor the Commission has adopted any specific advertising guidelines for any ETC.¹⁴ Nextel Partners' verified Petition commits the Company to advertising in both business publications and publications targeted to residential markets, and Nextel Partners will comply with any other advertising standards adopted by the Commission or the FCC. (Nextel Partners' Petition, § I.C.) The Intervenors offered no evidence, nor even any comments, suggesting any deficiency in Nextel Partners' plan or commitment to advertise its universal service offerings. Thus, the Commission should properly conclude that Nextel Partners satisfies the advertising requirement under Section 214(e)(1).

D. Nextel Partners Provides the Required Services Using its Own Facilities

An ETC must offer the required services using its own facilities or a combination of its own facilities and another carrier's services. Nextel Partners currently provides the required services using its existing, facilities-based digital network infrastructure and licensed CMRS

¹⁴ Universal Service Order, ¶ 148.

spectrum in Kentucky. (Nextel Partners' Petition, § I.A.) The Intervenors have offered any evidence challenging Nextel Partners' demonstrated satisfaction of this request. Accordingly, the Commission should find that Nextel Partners meets the requirement to provide service through its own facilities.

E. Nextel Partners has Identified Appropriate Designated Service Areas

The final requirement for ETC designation (except for the public interest factor in rural LEC areas discussed below), is that a carrier identify appropriate service areas through which it will offer and advertise the supported services. 47 U.S.C. § 214(e)(1). Section 214(e)(5) of the Act defines the term "service area" as a geographic area established by a State commission for the purpose of determining universal service obligations and support mechanisms. 47 U.S.C. § 214(e)(5). For an area served by a rural telephone company, 47 U.S.C. § 214(e)(5) provides that the term "service area" means the rural telephone company's "study area," unless and until the FCC and a state commission establish different service areas under the procedures set forth in 47 C.F.R. § 54.207(c)-(d). For an area served by a non-rural LEC such as BellSouth or Verizon, there is no "study area" requirement so an ETC's designated service area can be established on a wire center basis. 47 U.S.C. § 214(e)(5).

Nextel Partners' Petition includes Attachment 1 listing the rural LEC study areas and BellSouth/Verizon LEC wire centers in which Nextel Partners seeks designation as an ETC, which are fully consistent with the ETC service area requirements. (Nextel Partners' Petition, § II.) All areas are within Nextel Partners' licensed service areas. Nextel Partners commits to meeting the obligations of an ETC in those areas. (Declaration of Donald Manning, ¶ 6.) No

A "study area" is generally considered to be all of the rural telephone company's existing certificated exchange service areas in a given state. *Universal Service Order*, ¶ 172 n.434.

evidence has been presented by the Intervenors disputing Nextel Partners' ability to provide services in these areas.

Accordingly, Nextel Partners has identified appropriate service areas and demonstrated it can provide universal service to those who request it throughout its service areas as required of an ETC.

V. THE COMMISSION CAN ADDRESS CERTAIN CONCERNS BY INCORPORATING CONDITIONS RECENTLY APPROVED BY THE FCC

The FCC recently affirmed the designation of a wireless carrier as a competitive ETC in the Commonwealth of Virginia, and in doing so embraced certain voluntary commitments made by the carrier that would assist in demonstrating the benefits of the designation. In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338 (rel. Jan. 22, 2004) ("Virginia Cellular Order"). In the Virginia Cellular Order the FCC recognized that the designation of a wireless competitive ETC in rural areas serves the public interest and furthers the goals of universal service by providing, among other things, greater mobility, a choice of providers, and the benefits of larger local calling areas. Virginia Cellular Order, ¶¶ 12, 29. In addition, the FCC specifically recognized that greater access to mobile emergency services "can mitigate the unique risks of geographic isolation associated with living in rural communities." Virginia Cellular Order, ¶ 29.

The FCC further considered voluntary commitments Virginia Cellular made regarding customer service, reporting, and extension of facilities. The FCC embraced these commitments as consistent with the public interest, and recognized that these commitments alleviated certain concerns raised by opponents of ETC designations. Nextel Partners will make comparable

commitments set forth below, which further demonstrate the public interest benefits associated with granting Nextel Partners' Application in the state of Kentucky. The Commission can incorporate these conditions into an order designating Nextel Partners as an ETC.

A. Adoption of the CTIA Consumer Code for Wireless Service

The wireless industry is a competitive industry, where market forces have been allowed to shape customer service. The FCC recognized, however, that the CTIA Consumer Code for Wireless Service contains important customer protections, and that the adoption of those standards evidences a wireless ETC's commitment to customer service and service quality consistent with the public interest. *Virginia Cellular Order*, ¶ 30. Nextel Partners will adopt the CTIA Consumer Code where it is designated as an ETC, and suggests that the Commission incorporate this commitment into a designation order. A copy of the Consumer Code is attached as Exhibit A. The Company hopes that its formal adoption of and compliance with these principles will allow Nextel Partners to build on its industry-leading reputation for customer satisfaction and retention.

B. Consumer Complaint Reporting

The FCC determined in *Virginia Cellular* that the public interest was served by further efforts to collect service quality data from competitive ETCs. *Virginia Cellular Order*, ¶ 30. Nextel Partners supports these efforts and likewise commits to providing the Commission, on an annual basis, with the number of consumer complaints per 1,000 handsets. *Id.* The company will also provide the Commission with a point of contact within the Company to contact to address any customer service or service quality complaint received by the Commission. That contact person will have access to customer account information and the authority to resolve customer service issues.

C. Service Provisioning Commitment

To ensure that Nextel Partners meets its ETC obligation to respond to reasonable requests for service, the Company will implement the following steps, which were presented by Virginia Cellular and embraced by the FCC:

- 1) If a request comes from a customer within its existing network, Nextel Partners will provide service immediately using customer equipment selected by the customer. In practice, if Nextel Partners receives an Internet or phone order prior to 4:00 p.m., the phone is delivered by overnight mail the following morning.
- 2) If a customer cannot be served by existing network facilities, Nextel Partners will allow the customer to make a written request for service in a specific location. In response, Nextel Partners will take a series of steps to provide service.

First, Nextel Partners will determine whether the customer's equipment can be modified or replaced to provide service in a desired location.

Second, it will determine whether the customer could be provided with other network equipment (booster, antenna, or 3 watt unit) to provide service in the requested location.

Third, Nextel Partners will determine whether adjustments at the nearest cell site can be made to provide service.

Fourth, Nextel Partners will determine whether there are any other adjustments to either the network or the customer facilities that can be made to provide service.

Fifth, Nextel Partners will explore the possibility of offering resold service of carriers that have facilities available to provide service in that location.

Sixth, Nextel Partners will determine whether additional network infrastructure (additional cell site, extender or repeater) could be constructed to provide service, and evaluate the costs and benefits of using high-cost universal service support to serve a number of customers requesting service.

If, after these steps, the customer cannot be served, Nextel Partners will notify the customer and provide the Commission with an annual report of how many requests for service

could not be filled. The Commission would retain jurisdiction and authority to consider whether Nextel Partners has responded appropriately to a request for service as required by an ETC.

Nextel Partners believes that the formalization of this process will benefit consumers and give the Commission more confidence that Nextel Partners will meet its obligations to provide service "upon reasonable request" as an ETC.

D. <u>Use of Support and Progress Meeting Buildout Goals</u>

The FCC's rules provide a mechanism for ensuring that all ETCs are using support for the purposes for which that support is intended. Nextel Partners will comply with all applicable rules addressing those standards. In addition, Nextel Partners will submit information to the Commission on an annual basis detailing its progress towards meeting its build-out plans in the service areas where it has been designated as an ETC. The FCC recognized that this commitment would provide important information that could be used to evaluate an ETC's progress towards meeting its obligation to provide service throughout a service area. *Virginia Cellular Order*, ¶ 30. Nextel Partners proposes that the Commission can and should incorporate these standards into an order approving Nextel Partners' Petition.

VI. <u>NEXTEL PARTNERS' ETC DESIGNATION IN THE BELLSOUTH/VERIZON</u> WIRE CENTERS IS UNDISPUTED AND SHOULD BE GRANTED

Nextel Partners satisfies all of the basic Section 214(e) criteria for ETC designation in the BellSouth and Verizon wire centers. (Nextel Partners' Petition, § III.) BellSouth and Verizon did not intervene or oppose the Petition. Under Section 214(e)(2), the Commission "shall" grant ETC designation in such circumstances. Indeed, this Commission previously designated e-Tel as an ETC in non-rural telephone company areas where its Petition demonstrated its compliance with the eligibility requirements of Section 214(e). Thus, consistent with the Act and the

¹⁶ *e-Tel Order*, pp. 1-3.

Commission's prior ruling in *e-Tel*, the Commission should grant Nextel Partners' request for ETC designation in the BellSouth/Verizon wire centers.

To date, no party has requested a hearing in this proceeding. In light of the undisputed nature of Nextel Partners' request for ETC designation in the BellSouth/Verizon wire centers, the Commission should promptly designate Nextel Partners as an ETC in those areas whether or not the Commission orders a hearing on the "public interest" question in areas served by the Intervenors. In other words, if a hearing is requested, it should be limited to the issue of ETC designation in areas served by rural telephone companies, and Nextel Partners' ETC designation in non-rural telephone company areas should be effective immediately.

VII. <u>NEXTEL PARTNERS' ETC DESIGNATION IN AREAS SERVED BY THE RURAL TELEPHONE COMPANIES IS IN THE PUBLIC INTEREST</u>

The FCC has concluded that the public interest is served when rural consumers are provided the benefits of competitive universal services. In the absence of empirical evidence that rural consumers will be <u>harmed</u>, or evidence that a specific rural telephone company study area cannot support competitive universal service, the FCC has concluded an ETC application should be granted.¹⁷ This is fully consistent with the stated purposes of the Act:

To <u>promote competition</u> and <u>reduce regulation</u> in order to secure <u>lower prices</u> and <u>higher quality services</u> for American telecommunications <u>consumers</u> and encourage the <u>rapid deployment of new telecommunications technologies</u>.

Pub. L. No. 104-104, 110 Stat. 56 (1996) (emphasis added).

Consistent with these guiding principles, the Commission should consider the record evidence relating to the public interest in light of the following factors:

See In the Matter of Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2896, ¶ 16 (rel. Dec. 26, 2000) ("Western Wireless Order").

- Will the ETC designation facilitate competition in the provision of universal services to the benefit of Kentucky's rural consumers?
- Does the record demonstrate any significant adverse impact to any rural consumers resulting from the ETC designations so significant as to justify denying rural consumers the benefits of competition?

The record before the Commission demonstrates the goals of the Act and the interests of the public will be promoted by granting ETC designation to Nextel Partners. Kentucky's rural consumers will realize the benefits of competition through increased choices, and granting the designation will also further the deployment of new telecommunications services to Kentucky's rural consumers. Here, there is no evidence from the Intervenors that consumers may be harmed as a result of Nextel Partners' ETC designation. The Intervenors' unsupported allegations and policy objections challenging the public interest determination focus almost entirely on the perceived harmful impact to the rural LECs, not rural consumers. Accordingly, the Commission should approve Nextel Partners' Petition consistent with the public interest.

A. Granting ETC Designation Will Facilitate Competition to the Benefit of Rural Consumers

The Commission should first determine that Nextel Partners' ETC designation will facilitate competition that will benefit rural consumers consistent with the public interest. The 1996 Act requires that universal service goals be accomplished through competition. The Fifth Circuit Court of Appeals confirmed this when it recognized that a "primary purpose" of the Act is "to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service." The *Alenco* court confirmed that the Act must be implemented in a way that accommodates the "dual mandates" of promoting both competition and universal service. *Id.* at 615.

¹⁸ Alenco Communications, Inc. v. FCC, 201 F.3d 608, 625 (5th Cir. 2000).

Competition by Nextel Partners is in the public interest because of the general benefits that it brings to rural consumers. Granting ETC status to Nextel Partners will, for the first time, allow rural consumers a choice of ETCs for their telecommunications needs. By designating Nextel Partners, the Commission will allow consumers to choose basic service by determining which carrier provides the most advantageous pricing, services, service quality, customer service and service availability. (Nextel Partners' Petition, § IV.) Increased competition will also create incentives for the rural LECs to improve their respective networks, operate more efficiently and improve customer service, all of which benefits consumers and promotes universal service. (*Id.*)

In the long run, a fully competitive market will give customers more choice, so that consumers become the ultimate arbiters of the products and services that succeed in the market. When customers have a real choice of providers, all carriers must cut costs, innovate and provide better service. The Commission should facilitate competition in rural areas so that in the long run, rural consumers are provided the benefits of fully competitive markets.

The public interest is also served by the specific benefits that will be provided by Nextel Partners. As an ETC, Nextel Partners will provide services not otherwise available from the landline LECs. For example, current service offerings by incumbent LECs have restricted local calling areas and are bound by the limitations of landline technology. Nextel Partners has demonstrated that it will provide larger local calling areas, which will be of great benefit to rural consumers who currently have to pay toll charges to reach some local government offices, health care providers, businesses or family outside of a restricted landline calling area. (Nextel Partners' Petition, § IV.) Nextel Partners' service will also provide the benefits of mobility, which will have great appeal to many rural consumers. (*Id.*) This mobility component is a feature valued by Nextel Partners' rural consumers where the distance between phones is much

greater than in urban areas. Ultimately, Nextel Partners will provide innovative service offerings that will be tailored to consumers' needs.

Nextel Partners' ETC designation will also promote the deployment of wireless technologies throughout Kentucky by allowing the Company to continue to enhance and expand its network infrastructure. (*Id.*) Access to universal service funding will allow Nextel Partners to continue to extend its network throughout the State, and this network infrastructure will continue to be available to provide universal and advanced services to rural consumers in Kentucky. In short, customers will benefit as Nextel Partners builds out its network facilities. In fact, the Company today provides GPS location assistance for customers dialing 911 where requested by a PSAP. (Nextel Partners' Petition, § IV.) As it continues to expand its network in Kentucky this network infrastructure will be available to provide basic and enhanced services to its residents.

Nextel Partners' designation will also advance Section 254(b)(3) of the Act, which provides that rural consumers should have access to that same services available in urban areas:

consumers in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(Emphasis added.) Nextel Partners fulfills this fundamental aspect of universal service by offering rural consumers service, rates, terms and conditions that are the same in its rural areas as are provided by Nextel Communications in urban areas.¹⁹ The Commission's designation of

Nextel Communications is a separate, publicly traded company that provides service in large markets. Nextel Partners provides the same services and rate plans in Kentucky that Nextel Communications provides in, for example, Cincinnati.

Nextel Partners will advance this important universal service goal, and is fully consistent with the public interest.

Indeed, the Commission has already observed the benefits of competition in Kentucky markets. In designating e-Tel as an ETC, the Commission noted that "this designation will benefit consumers in Kentucky by expanding the range of competitive choices and providing an incentive for incumbent telephone companies to improve their existing networks." These same goals that the Commission has sought to encourage will be furthered by a grant of Nextel Partners' ETC designation. Accordingly, the Commission should find that designation of Nextel Partners in rural areas is in the public interest.

B. No Record Evidence Demonstrates That Rural Consumers Will Be Harmed By Nextel Partners' ETC Designation

The Commission should similarly find there is no reason to believe consumers will be adversely affected by the ETC designation. The focus of the public interest factor is properly on consumers, rather than on the rural LECs themselves. As the Fifth Circuit Court of Appeals noted:

The Act does <u>not</u> guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. The Act only promises universal service, and that is a goal that requires sufficient funding of <u>customers</u>, not <u>providers</u>. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.²¹

There is no evidence in the record that Nextel Partners' designation will lead to any such anticompetitive results. The Intervenors presented only unfounded allegations that Nextel

²⁰ e-Tel Order, p.2.

²¹ Alenco, 201 F.3d at 620 (emphasis in original).

Partners' ETC designation is not in the interests of rural LECs. Thus, the Commission should find that Nextel Partners' ETC designation is in the public interest.

C. Nextel Partners' Voluntary Commitments Advance the Public Interest

As noted above, Nextel Partners will make voluntary commitments regarding service quality, reporting, network expansion, and use of federal universal service support. The FCC has recognized the public interest is advanced by these types of commitments. *See Virginia Cellular Order, supra*. This Commission should also recognize that these commitments will ensure the public interest is served by Nextel Partners' ongoing service as an ETC in the state of Kentucky.

VIII. THE INTERVENORS' COMMENTS OPPOSING NEXTEL PARTNERS' ETC DESIGNATION SHOULD BE REJECTED

The Intervenors' comments seek to cloud this docket with unsupported allegations, a myriad of policy statements challenging federal USF funding objectives, and anticompetitive positions on wireless ETCs. The conditions and policies that the Intervenors seek to invoke do not serve universal service goals. The Intervenors' recommendations would deny ETC designation to entire class of carriers, namely, CMRS providers, and thus violate the FCC's stated policy of competitive neutrality. Accordingly, the Commission should reject the Intervenors' comments.

A. The Intervenors' Proposed "Public Interest" Framework Presents a False Choice Between Promoting Universal Service and Competition

The FCC's rules and funding mechanisms allow for and encourage competitive carriers to obtain funding in rural areas, thereby ensuring that universal service will be provided in a competitive environment and that rural consumers will not be left behind as new technology is deployed. The Commission should reject the Intervenors' proposed policy and legal framework for considering Nextel Partners' Petition as both illogical and unlawful. The Intervenors assert that "increasing competition [is not] enough to satisfy the public interest test," and contend

without any factual support that "designat[ion of] Nextel Partners as an ETC will not increase competition." (TDS Comments, §§ IV.A, IV.B.) The Intervenors wrongly believe the main goal of universal service under the Act should be to only fund rural LECs.

The Commission should not seek to undermine the goals of universal service to the detriment of rural consumers based on erroneous claims that federal universal service support is only intended to encourage rural LECs to invest in their networks for the benefit of landline service in rural areas. (TDS Comments, § IV.) Rather, the Commission should determine that the current federal universal system is equally intended to promote competition:

Commentors who express concern about the principle of competitive neutrality contend that Congress recognized that, in certain rural areas, competition may not always serve the public interest and that promoting competition in these areas must be considered, if at all, secondary to the advancement of universal service. We believe these commentors present a false choice between competition and universal service. A principal purpose of section 254 is to create mechanisms that will sustain universal service as competition emerges. We expect that applying the policy of competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers. For this reason, we reject assertions that competitive neutrality has no application in rural areas or is otherwise inconsistent with section 254.²²

In this case, the Intervenors mistakenly claim this Commission must choose between universal service and competition. The Commission should reject this false choice as the FCC has done. The Commission should instead recognize that Nextel Partners' provision of basic universal service in rural areas of the State is fully consistent with the Act and the stated goals of the FCC.

B. The Intervenors' Complaints Relating to alleged "Cream Skimming" and the Portability of Federal Universal Service Support are Misplaced

The Commission should reject the Intervenors' attempts to defeat Nextel Partners' designation as a federal ETC based on the FCC's current universal service funding mechanisms.

²² Universal Service Order, \P 50 (emphasis added).

The Intervenors again, without factual support, assert that designating Nextel as a ETC will result in "cream skimming or similar harms." (TDS Comments, § IV.C.) However, while the Intervenors note that cream skimming concerns "an additional ETC serving low cost areas while receiving USF that is based on average cost to serve the entire study," they also acknowledge that "disaggregation . . . solve[s] the cream skimming problem. . . . " (*Id.*) In other words, this is not a problem, and cannot be a reason to deny ETC designation.

Moreover, the Intervenors provide only speculation – based on their own fear of competition – that the distribution of federal universal service support would be disadvantageous to consumers. In fact, "portability" of federal universal service support is inherent in the funding system established by the FCC and was specifically affirmed by the Fifth Circuit in *Alenco*.²³ Moreover, the FCC's funding rules expressly contemplate the distribution of federal universal service support to a wireless carrier. Under 47 C.F.R. §§ 54.301-54.315, Nextel Partners' level of universal service support will be the same as the incumbent rural LEC. The FCC requires a wireless ETC to report its lines based on the billing address of the wireless customer is used to determine the amount of the support. 47 C.F.R. § 54.309 ("Competitive [ETCs] providing mobile wireless service in an incumbent LEC's service area shall use the customer's billing address for purposes of identifying the service location of a mobile wireless customer in a service area."). To the extent the Intervenors object to the FCC's funding system or rules, it should address those objections to the FCC, not raise them as grounds for denying Nextel Partners' Request for ETC designation.

²³ Alenco, 201 F.3d at 621-22.

C. Ongoing FCC Proceedings Should Not Delay Designation of Nextel Partners

as an ETC

The Intervenors contend that proposed FCC rule changes "could alter the outcome of this

proceeding," referencing a proposal that may reduce the amount of USF ILECs may receive

when additional ETCs are designated in their study areas. (TDS Comments, § V.)

proposed FCC rulemaking would not change any funding mechanism until 2006 at the earliest,

and presents no reason to hold up competition at this time. Any new rules will apply to all ETCs

on a going forward basis.

IX. CONCLUSION

The Act and the FCC's implementing orders and regulations establish clear, consistent

and competitively fair mechanisms for allowing carriers, including a CMRS provider, to be

designated as an ETC for the purpose of federal universal service support. Nextel Partners has

shown that it provides the required services, satisfies all statutory and regulatory requirements,

and can and will meet the obligations of an ETC. For rural consumers, the designation of Nextel

Partners as an additional ETC in rural LEC study areas will bring overwhelming benefits,

including competitive choice, new technology, and improved service, and so is clearly in the

public interest. Nextel Partners respectfully requests the Commission to follow the directives

and principles of federal law and to grant its Petition for designation as an ETC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Keith Moorman, an attorney with the law firm of Frost Brown Todd, LLC, hereby certify that on this the day of March, 2004, I caused a true and complete copy of the foregoing to be sent via U.S. Mail, postage-prepaid, to the following:

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CTIA

Consumer Code for Wireless Service

To provide consumers with information to help them make informed choices when selecting wireless service, to help ensure that consumers understand their wireless service and rate plans, and to continue to provide wireless service that meets consumers' needs, the CTIA and the wireless carriers that are signatories below have developed the following Consumer Code. The carriers that are signatories to this Code have voluntarily adopted the principles, disclosures, and practices here for wireless service provided to individual consumers.

THE WIRELESS CARRIERS THAT ARE SIGNATORIES TO THIS CODE WILL:

<u>O N E</u>

DISCLOSE RATES AND TERMS OF SERVICE TO CONSUMERS

For each rate plan offered to new consumers, wireless carriers will make available to consumers in collateral or other disclosures at point of sale and on their web sites, at least the following information, as applicable: (a) the calling area for the plan; (b) the monthly access fee or base charge; (c) the number of airtime minutes included in the plan; (d) any nights and weekend minutes included in the plan or other differing charges for different time periods and the time periods when nights and weekend minutes or other charges apply; (e) the charges for excess or additional minutes; (f) per-minute long distance charges or whether long distance is included in other rates; (g) per-minute roaming or off-network charges; (h) whether any additional taxes, fees or surcharges apply; (i) the amount or range of any such fees or surcharges that are collected and retained by the carrier; (j) whether a fixed-term contract is required and its duration; (k) any activation or initiation fee; and (l) any early termination fee that applies and the trial period during which no early termination fee will apply.

<u>T W O</u>

MAKE AVAILABLE MAPS SHOWING WHERE SERVICE IS GENERALLY AVAILABLE

Wireless carriers will make available at point of sale and on their web sites maps depicting approximate voice service coverage applicable to each of their rate plans currently offered to consumers. To enable consumers to make comparisons among carriers, these maps will be generated using generally accepted methodologies and standards to depict the carrier's outdoor coverage. All such maps will contain an appropriate legend concerning limitations and/or variations in wireless coverage and map

usage, including any geographic limitations on the availability of any services included in the rate plan. Wireless carriers will periodically update such maps as necessary to keep them reasonably current. If necessary to show the extent of service coverage available to customers from carriers' roaming partners, carriers will request and incorporate coverage maps from roaming partners that are generated using similar industry-accepted criteria, or if such information is not available, incorporate publicly available information regarding roaming partners' coverage areas.

THREE

PROVIDE CONTRACT TERMS TO CUSTOMERS AND CONFIRM CHANGES IN SERVICE

When a customer initiates service with a wireless carrier or agrees to a change in service whereby the customer is bound to a contract extension, the carrier will provide or confirm the material terms and conditions of service with the subscriber.

<u>FOUR</u>

ALLOW A TRIAL PERIOD FOR NEW SERVICE

When a customer initiates service with a wireless carrier, the customer will be informed of and given a period of not less than 14 days to try out the service. The carrier will not impose an early termination fee if the customer cancels service within this period, provided that the customer complies with applicable return and/or exchange policies. Other charges, including airtime usage, may still apply.

<u>FIVE</u>

PROVIDE SPECIFIC DISCLOSURES IN ADVERTISING

In advertising of prices for wireless service or devices, wireless carriers will disclose material charges and conditions related to the advertised prices, including if applicable and to the extent the advertising medium reasonably allows: (a) activation or initiation fees; (b) monthly access fees or base charges; (c) any required contract term; (d) early termination fees; (e) the terms and conditions related to receiving a product or service for "free;" (f) the times of any peak and off-peak calling periods; (g) whether different or additional charges apply for calls outside of the carrier's network or outside of designated calling areas; (h) for any rate plan advertised as "nationwide," (or using similar terms), the carrier will have available substantiation for this claim; (i) whether prices or benefits apply only for a limited time or promotional period and, if so, any different fees or charges to be paid for the remainder of the contract term; (j) whether any additional taxes, fees or surcharges apply; and (k) the amount or range of any such fees or surcharges collected and retained by the carrier.

SIX

SEPARATELY IDENTIFY CARRIER CHARGES FROM TAXES ON BILLING STATEMENTS

On customers' bills, carriers will distinguish (a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees and other charges collected by the carrier and remitted to federal state or local governments. Carriers will not label cost recovery fees or charges as taxes.

SEVEN

PROVIDE CUSTOMERS THE RIGHT TO TERMINATE SERVICE FOR CHANGES TO CONTRACT TERMS

Carriers will not modify the material terms of their subscribers' contracts in a manner that is materially adverse to subscribers without providing a reasonable advance notice of a proposed modification and allowing subscribers a time period of not less than 14 days to cancel their contracts with no early termination fee.

EIGHT

PROVIDE READY ACCESS TO CUSTOMER SERVICE

Customers will be provided a toll-free telephone number to access a carrier's customer service during normal business hours. Customer service contact information will be provided to customers online and on billing statements. Each wireless carrier will provide information about how customers can contact the carrier in writing, by toll-free telephone number, via the Internet or otherwise with any inquiries or complaints, and this information will be included, at a minimum, on all billing statements, in written responses to customer inquiries and on carriers' web sites. Each carrier will also make such contact information available, upon request, to any customer calling the carrier's customer service departments.

NINE

PROMPTLY RESPOND TO CONSUMER INQUIRIES AND COMPLAINTS RECEIVED FROM GOVERNMENT AGENCIES

Wireless carriers will respond in writing to state or federal administrative agencies within 30 days of receiving written consumer complaints from any such agency.

TEN

ABIDE BY POLICIES FOR PROTECTION OF CUSTOMER PRIVACY

Each wireless carrier will abide by a policy regarding the privacy of customer information in accordance with applicable federal and state laws, and will make available to the public its privacy policy concerning information collected online.